IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2529 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE M.R. SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

HARIBHAI CHANABHAI VORA

Versus

KESHUBHAI HARIBHAI VORA

Appearance:

1. Special Civil Application No. 2529 of 2004

MR RR TRIVEDI for Petitioner No. 1-3

MR BHAVESH P TRIVEDI for Petitioner No. 1-3

MS HINA DESAI for Respondent No. 1

RULE SERVED for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE M.R. SHAH

Date of decision: 02/12/2004

ORAL JUDGEMENT

#. In this petition filed under Article 227 of the Constitution of India, the petitioner has challenged the legality and validity of the order dated 31.1.2004 passed by the learned Civil Judge (Junior Division), Jetpur below Exh.77 in Regular Civil Suit No.153 of 2002 by which the learned trial Court has passed the order directing the petitioner No.1 - original defendant No.1 to remain present before the Government Hospital for his DNA test.

#. The respondent herein - original plaintiff has filed Regular Civil Suit No.153 of 2002 in the court of the learned Civil Judge (Junior Division), Jetpur for declaration to the effect that the property in question is the ancestral property and he has right and title over the land in question. In the said suit, the petitioners original defendants appeared and filed the written statement and it was denied by petitioner No.1 original defendant No.1 that the plaintiff is his son. Considering the said stand in the written statement by the defendant, the application below Exh.77 was given by the respondent - original plaintiff for having DNA test of the plaintiff as well as of the original defendant No.1 and on that application, the trial Court passed the order allowing the said application directing petitioner No.1 and the respondent herein - original plaintiff to appear before the Government Hospital for their DNA test. Being aggrieved by and dissatisfied with the same, the present petition has been filed by the petitioners-original defendants.

#. Mr.Trivedi, learned advocate appearing for the petitioners has submitted that the impugned order passed by the learned trial Court directing petitioner No.1 to appear before the Government Hospital for DNA test is absolutely illegal and without jurisdiction and against consent of petitioner No.1 which is not permissible. He submitted that by directing petitioner No.1 to appear before the Government Hospital for DNA test is an interference contrary with his personal liberty. He further submitted that compulsion to undergo medical examination is certainly interference with the personal liberty of the citizen, i.e. petitioner No.1 herein and such personal liberty could only be interfered with the consent of petitioner No.1. He submitted that, in the present case, petitioner No.1 has not given any consent for DNA test. He has relied upon the judgment of the Honourable Supreme Court in the case of Gautam Kundu Vs. State of W.B. and another, reported in AIR 1993 SC 2295. Relying upon the said judgment, he has submitted that, as held by the Honourable Supreme Court before the blood

test of a person is ordered, his consent is required, as, that test is concerned with his personal liberty and cannot be carried out without his consent. He submitted that, even the Honourable Supreme Court has gone to the extent that even if there is legislature which can compel the blood test, then also unless and until there is consent of the concerned person, he cannot be compelled to appear before the hospital for giving blood test. Relying upon the said decision, he submitted that so far as DNA test is concerned, in these advance days it can be compared with and the same analogous can be applied even for the DNA test also. He has relied upon the judgment of the Kerala High Court in the case of Sajeera Vs. P.K.Salim, reported in 2000 CRI.L.J. 1208, the judgment of the Andhra Pradesh High Court in the case of Syed Mohd. Ghouse Vs. Noorunnisa Begum, reported in 2001 CRI.L.J. 2028 and also the judgment in the case of Bipinchandra Shantilal Bhatt Vs. Madhuriben B.Bhatt, reported in 4 GLR 890. Very aspect with regard to compelling the father to submit himself to DNA test against his consent came to be considered by the Andhra Pradesh High Court in the case of Syed Mohd. Ghouse (supra). The Andhra Pradesh High Court considering the judgment of the Honourable Supreme Court in the case of Gautam Kundu (supra), has held as under.:

> "To compel a person to undergo or to submit himself or herself to medical examination of his or her blood test or the like without his consent or against his wish tantamounts to interference with his fundamental right of life or liberty particularly even where there is no provision either in the Code of Civil Procedure or the Evidence Act or any other law which may be said to authorise the Court to compel a person to undergo such a medical test as blood group test or the like against his wish, and to create doubt about the chastity of a woman or create doubt about the man's paternity will amount to nothing but interference with the right of personal liberty."

#. Ms.Heena Desai, learned advocate appearing for the respondent submitted that in view of the fact that petitioner No.1 has denied that he is the father of the respondent, and, therefore, to find out real truth, if the application is allowed and the DNA test is permitted, there is no illegality committed by the trial Court. Under the circumstances, she has requested to dismiss the present petition.

#. Heard the learned advocates for the parties.

#. It is an admitted position that petitioner No.1-original defendant No.1 has not given his consent for DNA test. The Honourable Supreme Court in the case of Gautam Kundu (supra) has held in para 26 as under.:

"From the above discussion it emerges :-

(1) that courts in India cannot order blood test as a matter of course;

(2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

(3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act.

(4) The Court must carefully examine as to what would be the consequence of ordering the blood test, whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

(5) No one can be compelled to give sample of blood for ayalysis."

Even, this Court in the case of Bipinchandra S.Bhatt (supra) as far as back in 1963 has held as under.:

"There is no provision under the Hindu Marriage Act or the rules framed thereunder, or in the Code of Civil Procedure or the Indian Evidences Act or any other law which would show any power in the Court to compel any party to undergo Medical Examination. A compulsion to undergo medical examination is certainly an interference with the personal liberty of a citizen and such personal liberty could only be interfered with under the provisions of any penal enactment or in exercise of any other coercive process vested in the court under law."

Identical question arose before the Andhra Pradesh High Court. In the case of Syed Mohd. Ghouse (supra), the Andhra Pradesh High Court set aside the order of the learned Judge of the Family Court Hyderabad who has ordered and directed the father to submit himself to DNA

test. Considering the judgment of the Honourable Supreme Court in the case of Gautam Kandu (supra), the Andhra Pradesh High Court has quashed and set aside the order by observing that "before ordering the blood test, either for DNA or other test, the court has to consider the facts and circumstances of the given case and the ramifications of such an order. But the Court cannot compel a person to give the sample of blood."

#. Considering the aforesaid aspect of the matter and the facts of the case, when petitioner No.1 - original defendant No.1 has not given consent for DNA test, he cannot be compelled to submit himself for DNA test and to appear before the Government Hospital for DNA test. As held by the Honourable Supreme Court and the other judgments, it will be interfering with the personal liberty. At the most, if petitioner No.1 is not giving consent for DNA test, and then at the most, adverse inference can be drawn at the final conclusion. But, as stated hereinabove, he cannot be compelled for DNA test. Considering the aforesaid facts and circumstances of the case, the order passed by the trial court below Exh.77 dated 31.1.2004 in Regular Civil Suit No.153 of 2002 is hereby quashed and set aside. Rule is made absolute with no order as to costs.

(M.R.Shah,J)

(pathan)